UNITED MALAYAN INSURANCE BHD.

v.

PAUL NG CHAI KHOON

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C3-23-3888-86]
29 MAY 1992

AGENCY: *Del credere agency - The factors that define a del credere agency - Whether the commission paid to the agent under the agency agreement rendered him a del credere agent.*

INSURANCE: *Premiums collected by insurance agent - Whether agent bears liability to settle balance due on premiums on policies issued irrespective of whether the premiums had been received by agent - Construction of terms of agency agreement.*

The plaintiff company had entered into an agency agreement with the defendant on 26 September 1985 whereby the defendant was appointed the plaintiff's insurance agent and required to collect all premiums due on policies issued. The agreement expressly stated in Clause 8(a) that the agent would be liable for the settlement of the balance due "irrespective of whether payments have in fact been received by him or not". A further clause in the agreement mentioned commissions would be paid to agents and referred to rates set forth in a schedule to the agreement.

The defendant left the company in 1986 and the plaintiff sued him for the premiums unpaid to the sum of RM117,339.21.

The plaintiff had obtained summary judgment before the SAR and the defendant appealed to the Judge in chambers, who allowed the appeal with costs. The plaintiff then applied for adjournment into open Court for further argument.

Held:

[1] The defendant was liable to pay the outstanding premiums, irrespective of whether he had received them or not, if he was paid an additional commission to bear such liability. The plaintiff did not assert in his affidavit that the defendant was paid a higher or additional commission and the defendant argued that the agreement showed no evidence of a higher commission being paid to him, which upon inspection of the terms clearly shows this to be the case. The agent was therefore not a *del credere* agent and does not bear the liability of paying outstanding dues from third parties to his principal under the *del credere* principle.

[2] Going by the terms of the agreement, specifically Clause 8(a), the defendant was also not liable as there was no consideration for such an obligation under Clause 8. The defendant is allowed to adduce evidence to contradict or vary the terms of the written contract by virtue of proviso (a) to s. 92 of the Evidence Act 1950.

[3] Even if Clause 8(a) of the agreement was not bad for want of consideration and even if it is assumed the defendant is a *del credere* agent, the plaintiff is still not entitled to claim from the defendant the sum of RM117,339.21. This conclusion arose from the fact that both plaintiff and defendant gave different dates for the termination of the agency contract and therefore the sum of money due was uncertain and unascertainable. Further the plaintiff's statement of accounts did not show the fact that the various insureds failed to pay the premiums claimed for.

[Appeal dismissed and order made in chambers allowing defendant's appeal confirmed. Costs of further argument in favour of defendant.]

[Editorial Note: The plaintiffs have appealed to the Supreme Court *vide* Civil Appeal No. 03-124-91.]

Cases referred to:
Royal Insurance Group v. David [1976] 1 MLJ 128 ***(foll)***
JM Wotherspare & Co. Ltd. v. Henry Agency House [1962] 28 MLJ 86 ***(foll)***
Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 ***(refd)***
Thomas Gabriel & Sons v. Churchill & Sim [1914] 3 KB 1272 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92 proviso (a)

Other source referred to:
Fidman's Law of Agency, 3rd Edn., @ p. 29

For the plaintiff - Leow Chai Fah; M/s. Leow & Associates
For the defendant - B.E. Teh; M/s. Teh & Associates

JUDGMENT

Zakaria M. Yatim J:

This is an appeal by the defendant against the decision of the Senior Assistant Registrar given on 27 October 1987 allowing the plaintiff's application to sign final judgment against the defendant.

After considering the evidence and the arguments of both Counsel for the plaintiff and the defendant, I allowed the appeal with costs. On the application of Counsel for the plaintiff, I adjourned the matter into open Court for further argument.

According to the statement of claim, an agency agreement was entered into between the plaintiff and the defendant on 26 September 1985. By this agreement the plaintiff appointed the defendant as agent of the plaintiff to represent the plaintiff in the soliciting of the various classes of general insurance business written by the plaintiff. Under the agency agreement the defendant was required to promptly collect all premium due on policies issued under the agency and would be liable to the plaintiff for the settlement of the balance due under the said agency agreement irrespective of whether payments had in fact been received by the defendant or not. The plaintiff alleged that it had rendered monthly statements of account to the defendant and as at 30 September 1986 the defendant owed the plaintiff the outstanding sum of RM117,339.21. The plaintiff demanded payment of the said sum but the defendant failed to pay the said sum or any part thereof.

No statement of defence was filed by the defendant.

The plaintiff's claim purported to be on the basis that the defendant was a *del credere* agent. Mr. B.E. Teh, Counsel for the defendant submitted that the defendant was not a *del credere* agent because there was no evidence that the defendant was paid a higher commission.

In order to determine this question, it is necessary to examine the agency agreement. Clause 8(a) of the agreement states:

> (a) The agent shall promptly collect all premiums due on the policies issued under their agency and shall be liable to the company for the settlement of the balance due under this agreement irrespective of whether payments have in fact been received by them or not.

Clause 9(a) provides:

> (a) The company shall allow to the agent, commissions for the policies issued under their agency and other allowances if any agreed, at the rates set out in the attached Schedule of Commission.

The Schedule sets out the terms of the commission allowed by the plaintiff in respect of the various policies stated therein.

The question now is whether the defendant was a *del credere* agent under the agency agreement.

In *Royal Insurance Group v. David* [1976] 1 MLJ 128, the Federal Court at p. 129 defined a *del credere* agent as a "mercantile agent, who in consideration of extra remuneration, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contract ... shall duly pay any sums becoming due under those contracts ..." In *J.M. Wotherspare & Co. Ltd. v. Henry Agency House* [1962] 28 MLJ 86, Suffian J, as he then was said at p. 27 that "... it is quite clear that to constitute a *del credere* agency not only is it necessary for a commission to have been paid by the plaintiff to the defendant, but an additional commission should also have been paid ...".

The defendant in his affidavit affirmed on 14 August 1987, denied that he was paid a higher commission under clause 8 of the agency agreement. In that affidavit, he averred in para. 3(i)(ii) and (vii) as follows:

> (i) I was in the employment of the plaintiff company since 1973. I left the employment of the plaintiff company in March 1986.
>
> (ii) In 1985, the plaintiff company merged with one East West Insurance Company Berhad. Prior to such merger...
>
> (vii) I further state that **there was no consideration** (in the form of higher commission) for any obligation under Clause 8 of the agency agreement, to be responsible for premium collection. As such I say that I am not a *del credere* agent of the Company and consequently not liable to the plaintiff for such premium, if any, which is denied, which has not been paid by the insured.
>
> [Emphasis added]

The averments in the above paragraph had not been denied by the plaintiff. Indeed, Mr. Kang Hak Kooi in his affidavit affirmed on 19 August 1987 on behalf of the plaintiff said in para. 7 that "... the question of want of consideration in the form of higher commissions as alleged does not arise..."

In a subsequent affidavit affirmed on 23 October 1987, the defendant explained how his remuneration was computed. In paragraphs 2 and 3 of that affidavit he averred:

> 2. Referring to para. 4 of the affidavit, I reiterate that the sum of RM40,066.29 appearing in the statement of accounts as at 30 November 1985 is the aggregate of premium collectible by the plaintiff in respect of policies issued prior to the agency agreement.
>
> Prior to the merger of East West and United Malayan Insurance Co. Bhd. and prior to the agency agreement, I enjoyed an over-riding commission on policies issued under my account (not as a *del credere* agent) whether the policy was canvassed by me or others under my charge.
>
> In fact, my salary was based on yearly premium collection. I was paid as salary an average of 4% of net annual premium collected. This practice was observed even after the so-called agency agreement purported to constitute me a *del credere* agent. In truth and in

fact, I did not receive any commission at all not to say a higher rate of commission. My salary was still based on the formula aforesaid. In truth and in fact, no commission was ever paid to me: such items only appear in the accounts kept by the plaintiff as book entries.

3. In reply to para. 5 of the said affidavit, I state that after my letter of resignation dated 1 April 1986, I only went to the plaintiff's office occasionally. I did no work, nor did I canvass or solicit any insurance business for the plaintiff. As for the policies renewed either at the instance of the plaintiff or the insureds, I state that there ought not to be part of the plaintiff's claim.

I further state that there can be no renewal of a policy, automatically as contended for by the plaintiff.

I reiterate that after March 1986, the plaintiff knowing full well of my imminent departure, arbitrarily and improperly debited my account for various policies, whether new or renewed policies.

The above averments were also not controverted by the plaintiff. I have read the plaintiff's affidavits and I agree with Mr. B.E. Teh that the plaintiff did not assert that the defendant was paid a higher or additional commission. In the absence of any reply to the defendant's above averments, I consider that the said averments were accepted by the plaintiff. See: *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 @ 385.

It is therefore my finding that the defendant did not receive a higher commission under the agency agreement. My finding is not inconsistent with Clause g(a) of the agreement where it merely refers to commissions and not higher commissions. The schedule to the agreement contains the terms of the commission but it does not refer to a higher or additional commission.

In the circumstances the defendant was not a *del credere* agent at the material time.

If the defendant was not a *del credere* agent, was he liable to pay the plaintiff premia which were not received by him as provided in Clause 8(c) of the agency agreement. In the *Royal Insurance* case, the Federal Court decided that a *del credere* agent was liable irrespective of whether or not he had collected the premia from the persons to whom the policies were issued through his agent. The defendant, in his affidavit quoted above said that there was no consideration for his obligation under Clause 8 of the agency agreement.

In my opinion the plaintiff is not entitled to claim from the defendant any premium which had not been received by the defendant. Although Clause 8(a) states that the defendant was liable to pay such premium I agree with the defendant's contention that there was no consideration for such obligation under Clause 8. It is true that under s. 92 of the Evidence Act, when the terms of a contract has been reduced to the form of a document, no other evidence is allowed to contradict or vary the terms of the contract. But proviso (a) to that section states that "any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as ... want or failure of consideration ...".

If I am wrong in holding that Clause 8(a) is bad for want of consideration and assuming that the defendant was a *del credere* agent the next question to consider is whether the plaintiff is entitled to claim from the defendant the amount as prayed in the statement of claim.

A *del credere* agent would only be liable if the third party actually failed to pay the premium and if the sum of money is certain or ascertained. In *Thomas Gabriel & Sons v. Churchill & Sim* [1914] 3 KB 1272, Buckley LJ in his judgment at p. 1279 said:

> The liability of the *del credere* agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not expose the *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

Fidman's Law of Agency, 3rd Edn., at p. 29 states, "The agent's liability only extended to a liability to pay the price of the goods (if certain or ascertained) on default or insolvency of the buyer.

The amount claimed by the plaintiff is based on the plaintiff's statement of account exhibited to the plaintiff's affidavit in support of its application for summary judgment. Neither the statement of account nor the plaintiff's affidavit shows that the various insureds failed to pay the premia.

The next question is whether the amount claimed is certain or ascertained.

As already stated the plaintiff's claim was based on the agency agreement. The agency agreement was entered into on 26 September 1985. Under Clause 15(c) of the agreement the defendant's liability to pay the plaintiff in respect of premia due on policies issued under the agreement commenced from 1 October 1985 and would continue indefinitely until the agreement was terminated by one of the parties. The plaintiff's statement of account shows that as at 31 October 1986 the amount due for the plaintiff was RM117,239.93.

The defendant, in his affidavit affirmed on 14 August 1987 disputed any liability to the plaintiff in respect of policies issued since March 1986. He said that by that date he was no longer in the employment of the plaintiff and he did not canvass or solicit insurance business for the plaintiff. In his letter to the plaintiff dated 1 April 1986, the defendant wrote,

> Mr. Warrick Lim
> General Manager
> East West-United Malayan Insurance Co. Bhd.
> 15th Floor, Wisma Sime Darby
> Jalan Raja Chulan
> Kuala Lumpur.
>
> Dear Mr. Lim,
>
> Since my employment as Marketing Executive with United Malayan Insurance 14 years ago, I had determined to do my best for the company. Now I have proven my sincerity through the increase in premium income from the humble three hundred thousand dollars annually to the present around two million dollars annually. As you are well aware that after the merger of East West and UMI, the new management has adopted regulations that enforce unfavourable conditions on my clients and imposed an agency agreement on me. The latter implies that all the responsibilities of debt related to the business I generate will be solely borne by me. I am unhappy with the above mentioned new regulations. Several requests had been made to the present management to withdraw, but until now, the management has given no reply to my requests.
>
> At present, I am being offered a post as Marketing Manager in another organization. Seeing no possible compromise with the management in this company, I have decided to accept the offer. Therefore, please regard this letter as a formal notice to take effect on 1 April 1986 indicating my termination of service with United Malayan Insurance Co. Bhd., on 31 June 1986. This three months notice is given to comply with my employment contract.
>
> Thank you for your attention.

Yours faithfully,

Sgd/- Paul Ng

In its reply the plaintiff wrote to the defendant that the defendant's last date of employment with the plaintiff was 31 May 1986. The plaintiff's letter is reproduced below:

Mr. Paul Ng Chai Woon
40 Jalan SS22/3
Damansara Utama
Petaling Jaya.

Dear Mr Ng

Resignation

Your letters dated 1 April 1986 and 30 April 1986 on your resignation refers.

Since we are unable to accept your requests and our counter proposals were unacceptable to you, we regret that we will have to accept your resignation.

However, we understand that you have already joined another company effective 1 June 1986. As such, your last date of employment with us will be 31 May 1986.

We take this opportunity to thank you for your services rendered and wish you all the best in your future endeavours.

Yours sincerely,

How Lian Koo
Deputy General Manager.

cc: General Manager
Financial Controller
Manager, Marketing/RI/Broking.

Mr. Kang Hak Koon in his affidavit affirmed on 17 August 1987 on behalf of the plaintiff averred that the agency agreement was not terminated and the defendant continued to be liable to the plaintiff under the agreement. In para. 5 of the affidavit he said,

> The agency agreement executed between the plaintiff and the defendant was never terminated despite the defendant's resignation from the plaintiff's employment. I verily believe that under the agency agreement the defendant is liable for the premiums as he is entitled to the commissions for the business secured. I verily believe that some of the business in his account was automatically renewed by the plaintiff when no specific instructions from the defendant or the insureds were received in relation to the relevant policies. In the event any policies were renewed the defendant was given the commissions credited to the defendant's account as shown in the statement of account. I verily believe that in the absence of any notice from the defendant the plaintiff treated the defendant's business as belonging to the defendant. I am unable to see how the plaintiff's treatment of the defendant's account in such circumstances may be described as improper or unlawful as alleged or at all and I therefore refute the said allegations.

It seems to me that when the plaintiff wrote to the defendant informing him that his last date of employment with the plaintiff was 31 May 1986, it was implicit that the plaintiff was referring to the last date of employment under the agency agreement. If that was his last date of "employment" under the terms of the agency agreement then the defendant was not liable in respect of any premium issued after that date. There is no evidence that any notice pursuant to Clause 15 (b) was issued by either party.

It is therefore not clear to me when the defendant's agency was terminated. Different dates were given by both the defendant and the plaintiff. The amount claimed by the plaintiff cannot therefore be said to be certain or ascertained.

In the circumstances the plaintiff is not entitled to summary judgment on the ground that the amount claimed by the plaintiff is not certain or ascertained.

For the reasons stated above I confirm the order I made in chambers. The plaintiff would pay the costs of further argument to the defendant.

Also found at [1992] 4 CLJ 2055